SUPREME COURT, U. S.
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IN THE

# SUPREME COURT

OF THE

## UNITED STATES

October Term, 1969

No. 922

MAKAH INDIAN TRIBE, as a tribe and as a Federal corporation, on its own behalf and on behalf of each of its members,
*Appellant,*
v.
STATE OF WASHINGTON,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## MOTION TO DISMISS OR AFFIRM

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# INDEX


| | Page |
|---|---|
| Motion to Dismiss or Affirm | 5 |
| Opinion Below | 6 |
| Question Presented | 6 |
| Statute Involved | 6 |
| Argument | 7 |
| Conclusion | 15 |
| Appendix A | 16 |


## TABLE OF CASES


State v. Paul, 53 W.2d 789, 337 P.2d 33 (1959) ..... 8, 14


## STATUTES


Chapter 240, Laws of 1957 as amended by chapter 36, Laws of 1963 (chapter 37.12 RCW) ..... 6, 7, 8, 9, 14

RCW 37.12.010 ..... 6, 9, 10

RCW 46.04.430 ..... 12


## CONSTITUTION


State of Washington Constitution, Article 26 ..... 9


## OTHER AUTHORITIES


25 C.F.R. § 162.6 ..... 11, 12

Makah Treaty, 12 Stat. 939, Art. II ..... 10, 13

Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360) ..... 6, 7, 9, 14

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Appellee pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss this appeal on the ground that the judgment rests on an adequate nonfederal basis, or to affirm the decision of the Supreme Court of the State of Washington.

## OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 76 W.D.2d 645, 457 P.2d 590 (1969) printed as Appendix A in appellant's brief.

## QUESTION PRESENTED

Can the State of Washington assume jurisdiction over the operation of motor vehicles upon the public streets, alleys, roads and highways of the Makah Indian Reservation pursuant to a state law authorizing assumption of such jurisdiction enacted pursuant to the provisions of Public Law 83-280?

## STATUTE INVOLVED

The statute which is the basis for this appeal is chapter 240, Laws of 1957 (Chapter 37.12 RCW) as amended by chapter 36, Laws of 1963. The pertinent section of that statute is section 1, chapter 36, Laws of 1963 (RCW 37.12.010) which provides as follows:

> "The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the pro-

visions of RCW 37.12.021 have been invoked, except for the following:

"(1) Compulsory school attendance;
"(2) Public assistance;
"(3) Domestic relations;
"(4) Mental illness;
"(5) Juvenile delinquency;
"(6) Adoption proceedings;
"(7) Dependent children; and
"(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."[1]

## ARGUMENT

The decision of the Washington State Supreme Court upholding the validity of the enactment of chapter 37.12 RCW is clearly within the provisions of Public Law 83-280 (Section 6—authorizing the state to assume civil and criminal jurisdiction over Indian tribes and reservations).

In 1957 the legislature of the state of Washington adopted chapter 37.12 RCW which authorized the state to assume jurisdiction over Indian tribes within the state under certain conditions pursuant to the authority given to the states under Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360). Subsequently in 1963, the legislature amended chapter

[1]Appellant's Appendix D-9-13.

37.12 RCW and assumed state jurisdiction over all Indian tribes and reservations with regard to eight specific areas of law, one of which was the operation of motor vehicles upon public streets, alleys, roads and highways. The Makah Indian Tribe has never petitioned the governor to issue a proclamation assuming total state criminal and civil jurisdiction over the Makah Reservation under the 1957 act. However, the 1963 amendments to chapter 37.12 RCW apply to the Makah Tribe and Reservation as well as to all other Indian tribes and reservations within the state without regard to any other state jurisdiction.

The main issue involved in this appeal is whether the State of Washington has the authority under its constitution to assume jurisdiction over Indian tribes and reservations within this state pursuant to the provisions of Public Law 83-280 by legislative enactment and without amending Article 26 of the State Constitution. This question has been decided in the affirmative by the United States Court of Appeals for the Ninth Circuit in the case of *The Quinault Tribe of Indians, et al. v. A. M. Gallagher, et al.*, 368 F.2d 648, Cert.Den., 387 U.S. 907.[2] In that case, the court took notice of the case of *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) in which the Supreme Court of the State of Washington upheld the validity of the 1957 enactment of chapter 37.12 RCW on the grounds that the legislative enact-

[2]Appendix A.

ment represented the consent of the people of the state under Article 26 of the Washington State Constitution, and that a specific amendment of Article 26 by the voters of the state was not required.

The circuit court ruled that the federal courts were bound by the Washington State Supreme Court pronouncement as to state law and further that:

> "In our opinion, these state legislative enactments, upheld as to validity by the state supreme court, are in full compliance with the federal requirements."[3]

The court also discussed the argument of plaintiffs that the 1963 amendment of chapter 37.12 RCW was void because it represented only a partial assumption of state jurisdiction over Indian reservations which was not within the purview of Public Law 83-280. The circuit court upheld the 1963 enactment and ruled that it was not a partial assumption of jurisdiction since the state had expressed its willingness to assume complete criminal and civil jurisdiction over Indians and Indian reservations, but that with regard to some matters, a tribal resolution and a gubernatorial proclamation were required.

The argument of appellant that the 1963 amendment to RCW 37.12.010 creates state public highways on the Makah Indian Reservation is totally without merit. In the decision of the Washington State Supreme Court from which this appeal was

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[3] Appendix A.

taken, the court pointed out that the state does not claim title to the roads, but merely asserts that they are public roads, and accordingly, vehicles being operated on them are subject to the jurisdictional control of the state under the terms of RCW 37.12-.010. The state has not at any time asserted that it constructed any roads on the Makah Indian Reservation or that it owned any property interest in trust land on the Makah Indian Reservation, but it has asserted jurisdiction over the "public roads, streets, alleys and highways" on the Makah Indian Reservation to the same extent the state has jurisdiction over such roads throughout the state. Thus, the highways in question were never alleged to be *state* public highways and in fact are not *state* public highways, but are public highways under the provisions of the Code of Federal Regulations and state law.[4]

In addition, the Treaty between the United States Government and the Makah Indian Tribe[5] specifically provided authority for the federal government, if necessary for the public convenience, to put roads through the reservation. The public roads which are involved in the present case are part of the Bureau of Indian Affairs road system which was originally laid out by the bureau in 1917 at the time the Village of Neah Bay was platted. The main road through the reservation (PS #1), where the arrests

[4]Appellant's Appendix A.

[5]Exhibit 11.

[6]Appellant's Appendix D-1-2.

of Indian tribal members were made for operation of a motor vehicle without a driver's license, was constructed in 1928 by the bureau at the request of the tribe. At that time there were no federal laws or regulations relating to the construction of roads on Indian reservations. No federal regulations were promulgated by the Secretary of the Interior relating to the construction by the federal government of roads on Indian reservations until 1938. In that year, federal regulations were promulgated by the Secretary of the Interior and subsequently in 1957, 25 C.F.R. entitled "Roads of the Bureau of Indian Affairs" was promulgated supplementing the earlier regulations and providing in section 162.6 that:

> "Roads subject to the regulations in this part shall be open for free public use."

In a letter dated March 28, 1958 from the Office of Regional Solicitor, Portland, Oregon, to the Assistant Area Director of the Bureau of Indian Affairs,[7] it was pointed out that prior to 1938 no written consent of the Indian allottees for rights of way across individual allotments was required, and there could be implied consent from the acceptance by the allottee of the benefits of the road. The letter further pointed out that many of the early roads were constructed under C.C.C. laws and regulations, and consent was obtained by C.C.C. personnel, but that the consents obtained by the C.C.C. are not in the records of the Department of the Interior.

[7] Exhibit 8

In a letter dated July 10, 1963 from the Area Director of the Portland Area Office of the Bureau of Indian Affairs, he advised the Superintendent of the Western Washington Agency that all roads presently carried on the Indian Bureau road system are prima facie roads which "shall be open for free public use" under 25 C.F.R. § 162.6. He was further advised that accordingly all such roads would appear to fall within the provisions of RCW 46.04.430 which defines public highways as including:

> "* * * every way, lane, road, street, boulevard, and every way or place in the state open as a matter of right to public vehicular travel both inside and outside the limits of cities and towns."

Thus, roads which are open for free public use on the Makah Reservation under 25 C.F.R. § 162.6 would qualify as public highways under the laws of the state of Washington.

Under 25 C.F.R. § 162.6[8] the roads on the Makah Indian Reservation which are a part of the Bureau of Indian Affairs road system are open for free public use and can only be closed by the Secretary of the Interior when required for public safety, fire-prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbeds. Accordingly, it is clear that the Makah Indian Tribe itself does not possess the authority to close the public roads on this reservation to the general public. Thus, the argument of the Makah Indian Tribe that the exercise of state jurisdiction upon public highways

[8]Appellant's Appendix D-13.

on the reservation constitutes a taking of private Indian trust land for a public purpose without compensation to the Indian land owner is without merit.

The appellant contends that the state has jurisdiction over the operation of motor vehicles on the Makah Indian Reservation and that this would result in a grant to the general public of a vested right of entry into the Makah Indian Reservation. The 1855 Treaty between the United States and the Makah Indian Tribe specifically provides:

> "* * * nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; * * *"

Thus, the treaty requires the permission of the tribe and the Indian agent to enable any white man to reside upon the reservation. This is an entirely different matter than the right of the public to use the public highways constructed by the Bureau of Indian Affairs with federal funds. The State of Washington has not alleged that the existence of state jurisdiction over the operation of motor vehicles upon public highways grants the state the right to permit any individual or group of individuals to reside upon the reservation without permission of the Indian tribe or to control the entry of persons onto the reservation.

It should be pointed out in addition that the roads which have been constructed on the reservation at the request of the Makah Indian Tribe are of great benefit to the tribe in that they enable the general

public to have access to the reservation to engage in the pursuit of sports fishing which is carried on by members of the tribe who own and operate the charter fishing boats. This industry constitutes a substantial source of revenue to many members of the Indian tribe.

The argument of the appellant that the enactment of chapter 37.12 RCW is invalid because it interferes with the plenary federal authority over the Makah Indian Tribe is clearly without merit. The Congress of the United States by the enactment of Public Law 83-280 authorized the several states, including Washington, to assume jurisdiction over Indian tribes and reservations in the manner in which they see fit, and the Washington State Supreme Court in the case of *State v. Paul, supra*, upheld the validity of the legislative enactment assuming jurisdiction and ruled that Article 26 of the Constitution of the State of Washington did not have to be amended prior to the time such jurisdiction was assumed. In addition, the United States Court of Appeals for the Ninth Circuit has ruled that the state of Washington complied with the federal requirements in assuming such jurisdiction. However, the appellee has not contended that the state of Washington has authority under the 1963 act to interfere with the plenary federal authority over the Makah Indian Tribe. There has been no interference on the part of the state through its officials with the affairs of the tribe as managed by the tribal council or with the use of the land on the

reservation which belongs to the tribe and individual allottees.

## CONCLUSION

The Supreme Court of the State of Washington has properly determined that the state had authority to assume jurisdiction over Indian tribes and reservations by legislative enactment and without the necessity of a constitutional amendment, and further, that the state can exercise jurisdiction over all roads on Indian reservations which come within the definition of public streets, roads, alleys and highways.

The decision of the Washington State Supreme Court from which this appeal is taken should be affirmed by the court, or in the alternative, briefs should be submitted on the merits and oral argument allowed.

Respectfully submitted,

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# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE QUINAULT TRIBE OF INDIANS of the Quinault Reservation in the State of Washington, on its own behalf and on behalf of its members; and JAMES JACKSON, ALICE CHENOIS, PHILIP MARTIN, JOHN SHALE, W. D. PETIT, BENNIE CHARLEY, FRANK CAPOEMAN and JESSIE CURLEY, on their own behalves and on behalf of the members of the Quinault Tribe,

*Appellants*,

No. 19,868

vs.

A. M. GALLAGHER, individually and as Sheriff of Grays Harbor County in the State of Washington, JOHN J. O'CONNELL, individually and as Attorney General of the State of Washington; ALBERT D. ROSELLINI, individually and as Governor of the State of Washington,

*Appellees*.

[November 10, 1966]
On Petition for Rehearing

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Before: BARNES and HAMLEY, Circuit Judges, and MATHES, District Judge

HAMLEY, Circuit Judge:

In their complaint herein, plaintiffs asserted jurisdiction under 28 U.S.C. § 1343(3) (1964) and

Rev. Stat. § 1979 (1875) 42 U.S.C. § 1983 (1964) (Civil Rights Act), and under 28 U.S.C. § 1331 (1964) (federal question). The district court held that it did not have jurisdiction under these statutes and alternatively held that, if it did have jurisdiction, the action must nevertheless be dismissed because the complaint fails to state a claim on which relief can be granted. On appeal both of these alternative rulings were questioned, and written and oral argument was had thereon.

In our opinion, filed herein on September 19, 1966, we held that the district court correctly determined that it did not have jurisdiction under the statutes referred to above. We therefore affirmed without reaching the alternative ground for dismissing the action.

In a petition for rehearing, filed herein on October 19, 1966, plaintiffs call our attention to the fact that, on October 10, 1966, a new jurisdictional statute was enacted especially applicable to Indian tribes. This statute is Public Law 89-635, 80 Stat. 880 (1966), codified as 28 U.S.C. § 1362, the pertinent part of which reads as follows:

> "§ 1362. Indian tribes
>
> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

In their petition for rehearing, plaintiffs assert that the Quinault Tribe of Indians has, as required by section 1362, a governing body duly recognized by the Secretary of the Interior. They also argue that the new jurisdictional statute is applicable to cases, such as this, which are pending on appeal when the statute was enacted. Plaintiffs therefore ask us to hold that the district court had jurisdiction under the new statute, and to proceed to a determination of the alternative ground for dismissal—failure of the complaint to state a claim.

Defendants have filed a statement concurring in plaintiffs' request. As previously noted, the alternative ground has been fully argued in this court and neither plaintiffs nor defendants request further argument thereon.

We agree that the Quinault Tribe of Indians is an Indian tribe of the kind described in 28 U.S.C. § 1362, and that this newly-enacted statute is applicable to cases, such as this, which are pending on appeal when the statute was enacted. Section 1362 provides a basis for jurisdiction only where the matter in controversy arises under the Constitution, laws, or treaties of the United States. In this respect the new statute is identical with the general federal question statute, 28 U.S.C. § 1331. In our opinion of September 19, 1966, we held that the complaint raises three substantial federal questions. This ruling is equally applicable to section 1362.

We therefore conclude that insofar as plaintiff Indian tribe is concerned, the district court has jurisdiction under section 1362, and that dismissal of the action as to that plaintiff may not be affirmed on on jurisdictional grounds. To this extent, our opinion of September 19, 1966, is modified. As to the eight personal plaintiffs, however, the new jurisdictional statute has no application, and our earlier opinion therefore correctly disposed of the appeal insofar as they are concerned.

With regard to the Quinault Tribe of Indians we therefore turn to a consideration of the alternative ground for dismissal of the action relied upon by the district court—failure of the complaint to state a claim upon which relief can be granted.

In their complaint, plaintiffs attempt to state three claims. One of these is that, by reason of Public Law 280, described in our earlier opinion, Washington is precluded from asserting jurisdiction within Indian reservations until it first amends Article 26 of the state constitution.

Article 26 incorporates an "ordinance" prescribed by the enabling act which includes the provision that Indian lands "* * * shall remain under the absolute jurisdiction and control of the congress of the United States. * * *". Section 6 of Public Law 280, under which Washington purported to act in asserting jurisdiction within Indian reservations, provides in part, that the provisions of that act shall not become effective with respect

to such assumption of jurisdiction by any state "* * * until the people thereof have appropriately amended their State constitution or statutes as the case may be."

It follows, appellant argues, that since Washington's disclaimer of jurisdiction is imbedded in Article 26 of the state constitution, the method prescribed by section 6 of Public Law 280 for removing that disclaimer is to amend the constitution. Appellants point to legislative history indicating that, at the time Public Law 280 was under consideration, Congress was of the view that Washington would require an amendment of the state constitution. See 1953 U.S. Code Cong. and Admin. News, 2412-2414; 99 Cong. Rec. 10782, August 1, 1953.

Inasmuch as the Washington state disclaimer of jurisdiction was set forth as Article 26 of the state constitution, it is understandable that congressional spokesmen assumed that such disclaimer could be removed only by a constitutional amendment. But the underlying concern of Congress, we think, was not that a state disclaimer be removed in any particular way, but that it be removed in some way which would be valid and binding under state law, before federal jurisdiction be relinquished. Accordingly, we do not construe this legislative history as reading into Public Law 280 a requirement that Washington can remove its disclaimer only by a state constitutional amendment.

Article 26 of the state constitution, incorporating the ordinance referred to above, constitutes a compact with the United States, and is so designated. The introductory clause of that article reads as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the *people of this state:* * * *"
> (Emphasis supplied.)

In *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33, the Supreme Court of Washington upheld the validity of chapter 240, Laws of 1957, providing that Washington would extend its criminal and civil jurisdiction to Indians and Indian lands. In so doing, the court ruled that this legislative enactment represented the consent of the "people of this state," as those words are used in Article 26 of the state constitution. This ruling would be equally applicable to chapter 36, Laws of 1963, amending chapter 240, Laws of 1957. The federal courts are bound by this pronouncement as to state law.

In our opinion, these state legislative enactments, upheld as to validity by the state supreme court, are in full compliance with the federal requirements. It follows that, as to this matter, plaintiffs have failed to state a claim upon which relief can be granted.

A second claim which plaintiffs purported to state in their complaint is that the enabling act required Washington to amend its constitution before assuming jurisdiction over appellees. The enabling